United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 31, 2005

TO : Rosemary Pye, Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Veolia Water
Case 1-CA-41838 240-3333-8750

This case was submitted for advice as to whether the Region should continue to process this charge, which it had deferred under Collyer. We conclude that the Region should dismiss the charge, absent withdrawal, because the Union forfeited its right to present the unfair labor practice issue to the Board by conceding before the arbitrator it had no contractual claim and withdrawing its grievance.

FACTS

AFSCME Council 93 represents employees at Veolia Water's wastewater treatment plant located in New Bedford, Massachusetts. In November 2003, during the term of a collective bargaining agreement, the Employer unilaterally reduced the level of benefits in the contractual dental plan without notifying the Union, offering to bargain with the Union, or obtaining the Union's consent. When confronted by the Union, the Employer maintained that the contract merely precluded it from changing the insurance carrier, which it did not do, but was silent on maintenance of the level of benefits.

On January 9, 2004,[1] the Union grieved the change. On June 8, the Region deferred the charge in accordance with the deferral policy under Collyer Insulated Wire.[2]

On October 14, the parties met in arbitration. The Employer asserted that the contract merely limited the Employer's right to change insurance carriers, an action it did not take. Accordingly, the Employer argued that it did not violate the contract and thus that the arbitrator had no jurisdiction over the Employer's conduct. The Union interpreted the Employer's position as a renunciation of its prior agreement to proceed with arbitration. Under that interpretation, the Union withdrew its grievance. Instead,

[1] All dates are in 2004 unless specified otherwise.

[2] 192 NLRB 837 (1971).

the Union asked the arbitrator to resolve the merits of the instant Section 8(a)(5) charge. The Employer, however, argued that the arbitrator should not rule on the merits of an unfair labor practice charge.

The arbitrator issued his decision the same day. He initially noted that "the Union acknowledges that its grievance does not raise an issue under the parties' collective bargaining agreement." Thus, he denied the grievance. As to the merits of the Board charge, he further noted that, "the Employer contends that the only issues properly before me is an alleged violation" of the contract. Accordingly, the arbitrator concluded that he had no authority to expand upon his contractual jurisdiction to resolve the unfair labor practice issue.

The Union subsequently requested that since the arbitrator did not reach the merits of the contractual or statutory issues, the Region should continue processing the charge.

ACTION

We conclude that the Region should dismiss the charge, absent withdrawal, because the Union forfeited its right to present the unfair labor practice issue to the Board by conceding at arbitration that it had no contractual claim and withdrawing its grievance.

In United Technologies,[3] the Board extended its arbitration deferral policy set forth in Collyer Insulated Wire to cases alleging violations of Section 8(a)(1) and (3) and 8(b)(1)(A) and (2). The Board in United Technologies noted that it was fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their agreement. Where the parties have agreed to a voluntary dispute resolution machinery culminating in final and binding arbitration, "it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery."[4] The Board concluded that the statutory purpose of encouraging the practice and procedure of collective bargaining would be ill served by permitting the parties to ignore their agreement and to seek from the Board relief in the first instance. Accordingly, it is well-settled Board policy not to pursue unfair labor practice charges where a

[3] 268 NLRB 557 (1984).

[4] 268 NLRB at 559.

charging party "fails either to promptly file or submit the grievance to the grievance/arbitration process, or declines to have the grievance arbitrated if it is not resolved."[5]

In this case, the Union withdrew its grievance at arbitration based on its peculiar interpretation of the Employer's defense. The Employer contended at arbitration that the Union had no contractual claim, and thus that the arbitrator had no jurisdiction, because it had not changed the identity of the insurance carrier. The Union interpreted the Employer's substantive response to the grievance as a renunciation of its agreement to accede to arbitration. Consequently, the Union simply withdrew its grievance rather than present its case in chief. In his decision, the arbitrator characterized this transaction. According to the arbitrator, the Union asserted that its grievance did not raise a contractual issue, even though the Employer acknowledged that the grievance was "properly before" him, but meritless nonetheless.

By withdrawing its grievance in response to the Employer's contractual defense, the Union failed to pursue arbitration. Rather than attacking the Employer's contract interpretation, the Union simply withdrew its contract claim and asked the arbitrator to resolve a statutory Section 8(a)(5) question instead. It would frustrate national labor policy as set forth in United Technologies and reiterated to the Charging Party in the Region's Collyer deferral letter to permit the Union to force the Board to reassert jurisdiction over this unfair labor practice charge, where the Union withdrew a colorable grievance at arbitration.[6] The Board should not permit its Collyer-United Technologies deferral policies to be frustrated in this manner; a contrary result would reward the Union for its dubious judgment.

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[5] See NLRB Casehandling Manual Part One - Unfair Labor Practices at Section 10118.6 ("Pattern for *Collyer* Deferral Letter") (Government Printing Office September 2003). The Region sent the Charging Party a letter containing these instructions upon deferral of the charge. See also Spann Building Maintenance Co., 284 NLRB 470 (1987) (upon remand from court of appeals, Board modified order to provide that jurisdiction over deferred charge is retained in order to determine whether either employer or union resists or impedes prompt processing of charging party's grievance to arbitration).

[6] Of course, since arbitration is consensual, the Union could not compel the Employer to agree to arbitrate the alleged Section 8(a)(5) violation.

In these circumstances, the Region's reassertion of jurisdiction over the instant charge is not warranted. The Region should therefore dismiss this charge, absent withdrawal.

B.J.K.